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1401 I Street, N.W.
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April 30, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: *CC Docket No. 96-152, Telemessaging, Electronic Publishing, and Alarm Monitoring Services*

On behalf of SBC Communications, Inc., please find enclosed an original and six copies of its "*Opposition to Petition for Reconsideration*" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

A handwritten signature in dark ink, appearing to be "Gina Harrison", written in a cursive style.

Gina Harrison
Director
Pacific Telesis Group
(A Subsidiary of SBC Communications, Inc.)

Enclosure

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A handwritten number "025" in dark ink, written in a cursive style, positioned next to the "No. of Copies rec'd" label.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the)
Telecommunications Act of 1996:)

Telemessaging,)
Electronic Publishing, and)
Alarm Monitoring Services)

CC Docket No. 96-152

Opposition of SBC Communications Inc. to Petition for Reconsideration

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TELEPHONE COMPANY

Date: April 30, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Implementation of the)	CC Docket No. 96-152
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Telemessaging,)	
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Alarm Monitoring Services)	
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Opposition of SBC Communications Inc. to Petition for Reconsideration

SBC Communications Inc. ("SBC"), by its attorneys, submits its Opposition to the Petition for Reconsideration ("PFR") of AT&T Corp. ("AT&T") of the First Report and Order in this docket.¹ In its PFR, AT&T ignores the plain language of §274 of the Telecommunications Act of 1996 ("the Act") and, making essentially the same arguments it made in its Comments and Reply Comments, seeks to expand the limitations of §274(b) beyond those imposed by Congress. The Commission considered, and rejected, those arguments in the Order. AT&T

¹ Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, released February 7, 1997 ("Order").

has presented nothing new to justify changing the Order's interpretation of §274(b).

Congress intended to increase competition in the lines of business addressed in the Act, including electronic publishing. AT&T seeks to decrease competition by placing the BOCs at a competitive disadvantage not intended by Congress. In its attempt to impose as many restrictions as possible on the BOCs and their affiliates, AT&T ignores the clear language of §274(b), belittles the Commission's analysis, and denigrates the outcome as "unnatural and awkward". It is, in fact, AT&T's strained reading of §274(b) that is unnatural and awkward.

AT&T first argues that §§272(b) and 274(b) are so similar that they should be interpreted in an identical manner.² This is not correct.³ Even a cursory examination of §§272 and 274 shows that there is a difference in the structure of the two sections. Section 272 includes the requirement that the separate interLATA affiliate "shall operate independently" from the BOC as one of a list of five structural and transactional requirements.⁴ Based on that structure, the Commission found in the Non-Accounting Safeguards Order⁵ that the "operate

² AT&T's disclaimer (AT&T PFR at 5, fn. 11) that it "does not contend that the Commission necessarily is bound to adopt the same construction" is inconsistent with the arguments it actually makes.

³ The Commission did not, as AT&T suggests, determine that BOCs may use a single affiliate to offer electronic publishing and interLATA service because "the purpose and structure of the two sections are so similar." (AT&T PFR at 2) Rather, the Commission stated that nothing in the Act or its legislative history suggested that two affiliates would be required. (Order at ¶¶110-112) The Commission, although acknowledging that there are some parallels between the requirements of §§272(b) and 274(b), recognized that there are differences between the two sections, and required a BOC to comply with all of the requirements of both sections if it wishes to provide both services through a single affiliate. (*Id.*)

⁴ 47 U.S.C. §272(b)(1).

⁵ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and

independently' requirement of section 272(b)(1) imposes requirements beyond those listed in sections 272(b)(2)-(5)."⁶ Section 274(b) has a different structure -- the list of requirements is preceded by introductory language that states that a separated affiliate or electronic publishing joint venture "shall be operated independently" from the BOC, and that "such separated affiliate or joint venture" (referring back to the immediately preceding sentence) shall do or not do those things included in the list. Independent operation is the overall requirement, and the list indicates how that requirement will be met.⁷ The fact that one of the items on the list - §274(b)(3) - refers to "such independence" is further evidence of Congress' intent. The "operated independently" requirement is not, as AT&T claims, "an independent and distinct mandate."⁸

Furthermore, AT&T mischaracterizes the Commission's comparison of §272(b) and 274(b). The Commission did not observe that "§274(b) appears in a list with nine other requirements, while §272(b)(1) is part of a list of five restrictions."⁹ The Commission actually said

The "operated independently" requirement in section 274(b) is followed by nine substantive restrictions that we read as criteria to be satisfied to ensure operational independence between a BOC and its electronic publishing entity created pursuant to section 274(a). In contrast, the "operate independently" provision in section 272 appears in subsection 272(b)(1), which is one of five separate substantive requirements in section 272(b).¹⁰

Further Notice of Proposed Rulemaking, released December 24, 1997 ("Non-Accounting Safeguards Order").

⁶ *Id.* at ¶156.

⁷ Order at ¶¶64-65. See also Non-Accounting Safeguards Order at ¶157.

⁸ AT&T PFR at 3.

⁹ AT&T PFR at 5.

¹⁰ Order at ¶65.

AT&T's objection to the Commission's "terse explanation" of its determination that §§272(b) and 274(b) impose different requirements to implement the operational independence requirement is also unfounded.¹¹ There is no requirement of a lengthy discourse on the subject when Congress' intent is so clear. As the Commission noted, "[t]here is no evidence in the statute or its legislative history that Congress intended the restrictions in section 274(b) merely to be a list of minimum requirements that need to be supplemented by additional rules to be imposed on separated affiliates or electronic publishing joint ventures."¹² AT&T has not provided any such evidence.

AT&T next objects to the fact that within §274(b) Congress imposed different "operational independence" requirements on separated affiliates and joint ventures.¹³ AT&T blames this "unnatural and awkward reading" of the statute on the Commission's interpretation. But the Commission simply gave plain meaning to Congress' words.¹⁴ There is no ambiguity. Certain of the requirements apply to both separated affiliates and electronic publishing joint ventures, while other requirements, by their specific terms, apply only to separated affiliates.

AT&T also suggests that it is not reasonable for the Commission to infer that Congress knew what it was doing in defining operational independence

¹¹ AT&T's reliance on the "normal rule of statutory construction" that the same words used in different parts of the same statute must have the same meaning is also misplaced. Although that may be a common rule of statutory construction, it is not a rigid rule that must be followed inflexibly. See, e.g., Nationsbank of N.C. v. Variable Ann. Life Ins. Co., 513 U.S. __ (1995), citing Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932). Where, as here, Congress had made its intention clear, there is no need to resort to rules of statutory construction.

¹² Order at ¶64.

¹³ AT&T PFR at 4.

¹⁴ Order at ¶63.

for purposes of electronic publishing separated affiliates and joint ventures by listing nine separate, substantive requirements.¹⁵ Again, the Commission looked at what Congress wrote and concluded that Congress did not intend to have additional restrictions and requirements, beyond those enumerated in §274(b), imposed on electronic publishing separated affiliates and joint ventures.¹⁶ What is not reasonable is for AT&T to seek to have the Commission substitute its judgment for that of Congress as to the appropriate degree of separation between a BOC and its electronic publishing entity.

Finally, AT&T argues that the Commission erred in failing to consider its prior interpretations of the words “operate independently” in the context of the Commission’s pre-Act *Computer II* and cellular separation rules, suggesting that the Commission has “rescinded” its earlier rules. That characterization simply is not what happened here. In adopting the *Computer II* and the cellular separation requirements, the Commission was creating and interpreting its own rules -- it was not interpreting and implementing a Congressional directive, as it is doing here. In this instance, Congress told the FCC what “operated independently” means. There was no need to resort to prior Commission views of what “operate independently” meant in a completely different context to implement what Congress enacted here.¹⁷

¹⁵ AT&T PFR at 5-6.

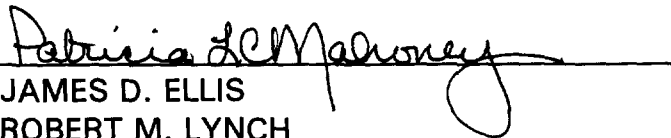
¹⁶ Order at ¶64.

¹⁷ AT&T’s citations are not apposite here. The Commission’s definition and use of “operate independently” in the *Computer II* and cellular context presumably embodied the Commission’s view of Congress’ policies in those contexts. If Congress had not been so clear in §274(b) it may have been appropriate, under Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973), to look to that prior usage. But Congress was clear here. There is no need to look to other

AT&T's PFR presents no basis for the Commission to modify its interpretation of §274(b). It should be rejected.

Respectfully submitted,

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contexts to interpret Congress' meaning. Nor is Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), relevant. In that case, an agency was rescinding a rule it had previously established. The Commission is not here rescinding its *Computer II* or cellular rules. It is implementing a completely separate Congressional requirement.

CERTIFICATE OF SERVICE

I, Cheryl Peters, hereby certify that copies of the foregoing "**OPPOSITION OF SBC COMMUNICATIONS, INC. TO PETITION FOR RECONSIDERATION**" regarding CC Docket No. 96-152 were served by hand or by first-class United States Mail, postage prepaid, upon the parties appearing on the attached service list this 30th. day of April, 1997.

BY: 
Cheryl Peters

Service List Docket 96-152

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